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ABSTRACT

Federal and state courts have held that disciplinary sanctions cannot be applied to handicapped students in such a way that they would be deprived of their legal rights to a free, appropriate public education in the least restrictive environment, as mandated by the Education for All Handicapped Children Act (EHA). This presentation outlines the due process provisions of the EHA and the "status quo" provision, which restricts changes that the school district may make in the child's placement without parental consent. Early litigation involving the EHA is described. A 1988 United States Supreme Court decision is traced through the district court and appeals court process. The decision, which ruled that handicapped students cannot be expelled for misconduct, at the same time upheld the use of normal disciplinary procedures such as suspensions. The policy implications and administrative implications of this decision are discussed. Forms for use in developing disciplinary policies and procedures and for documenting the use of disciplinary procedures are attached. 18 references. (JDD)

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DISCIPLINING HANDICAPPED STUDENTS:

LEGAL CONSIDERATIONS

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ABSTRACT

The Education for All Handicapped Children Act (EHA) mandates that all handicapped children are to be provided with a free appropriate public education in the least restrictive environment. The federal and state courts have been flooded with lawsuits regarding the provisions of the EHA since it took effect in 1977. The more controversial lawsuits concerns the application of disciplinary sanctions to handicapped students.

The courts have held that disciplinary sanctions cannot be applied in such a way that they would deprive handicapped students of their rights under the EHA. However, the courts have also not left school officials hamstrung. The Supreme Court has devised a scheme that strikes the delicate balance between school administrators' duty to maintain order and discipline and the rights of handicapped students to an appropriate education.

This paper presents the Supreme Court's ruling on disciplining handicapped students and provides guidelines for school administrators to follow in the disciplinary process. A documentation system that will provide invaluable assistance to school officials in the event of court action is also provided.

DISCIPLINING HANDICAPPED STUDENTS: LEGAL CONSIDERATIONS

By Allan G. Osborne, Jr,. Ed.D.

The Education for All Handicapped Children Act[1] (EHA) mandates that all handicapped children are to be provided with a free appropriate public education in the least restrictive environment. Since the EHA became effective in 1977 the state and federal courts have been flooded with lawsuits regarding its provisions and application to various facets of the educational process. One of the more controversial areas of litigation concerns the application of disciplinary sanctions to handicapped students.

The term "all handicapped children" includes those who are emotionally handicapped or behaviorally disordered. The courts have held that disciplinary sanctions, such as expulsions and suspensions, cannot be applied so as to deprive these students of their rights under the EHA. However, the courts also have not left school officials hamstrung. The courts have managed to strike the delicate balance between the ever-present duty of school officials to maintain order and discipline and the rights of handicapped students to receive an appropriate education in the least restrictive environment.[2]

EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

The EHA is silent when it comes to discipline. However, several of its provisions have implications for the disciplinary process. Specifically, the use of disciplinary sanctions by school administrators cannot in any way deprive

a handicapped student of any of the rights guaranteed by the EHA.

One of the unique, and most important, features of the EHA is its due process provisions.[3] Prior to the passage of the EHA school districts routinely made decisions about handicapped students, including decisions that excluded certain students, without involving or even notifying their parents. Congress corrected that situation in the EHA by including provisions that mandated parental involvement and required school districts to notify parents and provide them with an opportunity to be heard before any changes were made in the student's program. Under these provisions school districts cannot evaluate or place a handicapped child without parental permission. Once the child has been placed in special education, that placement cannot be changed unless the parents have been provided with proper notice of the school district's intent.

If the parents disagree with any of the school district's proposals or have any complaint regarding the provision of special education, the EHA's due process procedures provide an elaborate mechanism for the resolution of the dispute. Under this mechanism parents may appeal school district decisions to an impartial hearing officer. Any party who is not satisfied with the final outcome of the impartial hearing process may appeal to the state or federal courts. However, the EHA provides that during the pendency of these review procedures, the child is to remain in

his/her then current placement unless the parents and school district agree otherwise. In other words, until the dispute is finally resolved, the school district may not change the child's placement without parental consent. This has become known as the "stay put" or "status quo" provision and is the most important legal factor in disciplinary situations.

EARLY LITIGATION

In the first EHA case heard by a federal court the district court of Connecticut decided that the status quo provision prohibited any disciplinary measures that would result in an involuntary change in a handicapped child's placement. In Stuart v. Nappi[4] the court found that an expulsion would circumvent a handicapped child's right to an appropriate education in the least restrictive environment. The court reasoned that an expulsion was a change in placement but occurred in a manner that was not consistent with the EHA's change in placement procedures. However, the court recognized that handicapped children were not immune to discipline. If their behavior was so disruptive that it interfered with the educational process for others, the court indicated that they could be temporarily suspended or transferred to a more restrictive environment as long as the EHA's change in placement procedures were followed.

An Indiana district court in Doe v. Koger[5] agreed that the EHA limited a school's right to expel a handicapped student. This court, however, differentiated between conduct that was related to the handicap and conduct that

was not related to the handicap. The court held that schools could not expel a handicapped child whose disruptive behavior was caused by the handicap but could expel the student if the misconduct was not related to the handicap. Furthermore, the determination of whether the misconduct was handicap related must be made through the change in placement procedures. The court also agreed that handicapped students could be suspended or transferred to a more restrictive environment but warned that indefinite suspensions or other informal expulsions would be treated as expulsions.

The Fifth Circuit Court of Appeals in S-1 v. Turlington[6] expanded the manifestation of the handicap doctrine. The court agreed with the premise that handicapped students could not be expelled for conduct that was related to their handicap but indicated that this determination must be made by a specialized and knowledgeable group of persons. The court also placed the burden of raising the question of whether the conduct was handicap related on school officials. The court further held that even if a handicapped student was expelled under the proper circumstances and procedures, a complete cessation of services was not authorized. School officials would still be required to provide special education services under alternative arrangements.

In Kaelin v. Grubbs[7] the Sixth Circuit Court of Appeals agreed with previous rulings but emphasized that

handicapped students were not totally immune from the disciplinary process. Indicating that handicapped children could generally be disciplined in the same manner as nonhandicapped children as long as the proper procedural safeguards were followed, the court stated that a handicapped child could be suspended or even expelled in appropriate circumstances.

The Eleventh Circuit Court of Appeals gave its stamp of approval to an involuntary transfer to a more restrictive placement in Victoria L. v. District School Board of Lee County.[8] The school district had proposed a transfer to an alternative school for a student who had brought weapons to school and threatened another student. When the student's parents refused to consent to the transfer the school district ordered an involuntary transfer. Their decision was upheld by the courts.

The Fifth Circuit Court of Appeals also approved a school district's refusal to readmit a handicapped student to his former program after he had rejected all other options offered in Jackson v. Franklin County School Board.[9] The student had engaged in disruptive sexual conduct in school and had been placed in a state hospital for treatment. Following his release he attempted to return to school but school officials, feeling that they could not meet his needs, recommended several other alternatives. The student rejected those options and claimed he was entitled to return to his former placement under the status quo

provision. The appeals court stated that school officials retained their authority to remove any student who disrupted the educational process or posed a threat to a safe school environment.

A relationship between a child's handicap and misbehavior is not difficult to establish. In School Board of the County of Prince William v. Malone[10] the Fourth Circuit Court of Appeals found that a relationship existed between the handicap and misbehavior of a learning disabled student who had been involved in several drug transactions. The district court had reasoned that the student's handicap caused him to have a poor self-image which caused him to seek peer approval by acting as a go-between for other students in the drug transactions. The appeals court found that this decision was not clearly erroneous. The court did, however, indicate that a change in placement might have been in order.

U.S. SUPREME COURT DECISION

In 1988 the U.S. Supreme Court issued its first decision in a case involving the discipline of a handicapped student. Honig v. Doe[11] involved the expulsion of two students in California who had been classified as emotionally disturbed and had been placed in special education programs.

Student Doe was known to have aggressive tendencies and had been placed in a developmental center for handicapped students. After he assaulted another student and broke a

school window he was suspended for five days and then indefinitely suspended pending an expulsion hearing. His attorney requested that the expulsion hearing be cancelled and the IEP team reconvened. When that request was ignored the attorney obtained a court order readmitting Doe to school.

Student Smith was also known to have aggressive tendencies but attended a special education program within a public school environment. He was placed on a half-day schedule after a number of incidents of misconduct. Later he was suspended for five days and recommended for expulsion for making sexual comments to female students. His attorney objected to the expulsion hearing and succeeded in having it cancelled. Smith was given the option of home tutoring or a return to the half-day schedule.

The district court held, as previous courts had, that handicapped students could not be expelled if their misconduct was a manifestation of their handicap and that the due process provisions outlined in the EHA must be followed when a handicapped student is disciplined. The court also held that in Smith's case a reduction to a half-day schedule amounted to a change in placement which also required the EHA's due process protections.

On appeal, the Ninth Circuit Court of Appeals, basically upheld the district court's decision.[12] The appeals court reiterated the concept that the EHA's due process safeguards replaced the usual due process safeguards

when the student to be disciplined was handicapped. According to the appeals court those special due process safeguards included: written notice, reconvening the IEP team, re-evaluating the student's needs and placement, informing parents of their right to appeal, and allowing the student to remain in his then current placement until any dispute was finally settled. However, the court also indicated that all reasonable disciplinary procedures that did not deprive the student of an appropriate placement could be employed. This includes temporary suspensions.

The U.S. Supreme Court affirmed the ruling that handicapped students cannot be expelled for misconduct.[13] In doing so, however, the high Court did not differentiate between misconduct that is handicap related or not handicap related as the lower courts had. School law commentators are in disagreement over the meaning of this omission. Some feel that since the factual situation of the case before the Court involved handicap related misconduct, the Court's expulsion ban applies only to handicap related misconduct.[14] Other commentators, including this one, feel that since the Court did not make a distinction, the ban is all-inclusive and prohibits the expulsion of any handicapped student regardless of the cause of the misconduct.[15]

The Court did, however, uphold the right of school administrators to use normal disciplinary procedures, such as a suspension of up to ten days, to deal with an immediate

disciplinary crisis. However, again the language of the Court is less than clear. The Court did not indicate whether this was ten cumulative or consecutive days.[16] During this cooling off period school officials can take further action, such as developing a more restrictive and more appropriate placement.

In order to not leave school officials hamstrung when the parents of handicapped students are not cooperative or disagree with the action taken, the Supreme Court has provided some recourse. The court emphatically stated that school officials could ask the courts to intervene if an alternative plan could not be worked out during the suspension period and returning the student to the then current placement was not feasible. In this respect the Supreme Court indicated that the courts can issue an injunction preventing a handicapped student from attending school if school authorities can show that the student would present a danger to other students. In such a situation the requirement that administrative remedies must be exhausted before court action is filed would be waived but the burden would be on school officials to show that court intervention was necessary.

POLICY IMPLICATIONS

During the past decade the courts have often been called on to decide issues of fact and points of law involving the implementation of the EHA.[17] Many of these decisions have required the courts to balance the interests

of the parties involved in the lawsuit. In cases involving discipline, that balancing act has been very delicate. On the one hand courts have had to consider the rights of the handicapped child to receive a free appropriate public education in the least restrictive environment as called for in the EHA. On the other hand the courts have had to consider the duty school administrators have to maintain order and discipline in the schools and the right of all students to attend safe schools. The courts have responded with decisions that ensure that the rights of handicapped students cannot be circumvented by the disciplinary process but do not leave them immune from disciplinary sanctions. Under those rulings school administrators are not prevented from taking action that will allow them to maintain a safe and disruption-free environment for learning. However, they must take a few extra steps before they can discipline a handicapped student.

School administrators may always take whatever action is necessary to restore order following an incident of misconduct regardless of whether the students involved are handicapped or not. That action may include traditional disciplinary sanctions such as a loss of privileges, detentions, or suspensions. The only sanction that is no longer available when the student is handicapped is an expulsion. Some caution must be exercised with suspensions since the Court has placed a ten day limit on suspension periods. Traditionally, courts have viewed lengthy, serial,

or indefinite suspensions as being the equivalent of an expulsion.[18]

For a handicapped student who has been continuously disruptive or has committed an offense that would normally result in an expulsion, the best course of action may be to transfer the student to a more restrictive placement. In order to do this the IEP team would have to reconvene and develop a new IEP. The transfer could not take place, however, if the student's parents objected.

The most important implication of the Honig decision is that the Supreme Court has provided schools with a vehicle for removing students who are clearly dangerous even absent parental cooperation. If the parents and the school district cannot agree on a placement for the student, the school district may ask the courts to intervene. The requested intervention could include either an order for the more restrictive placement or an order allowing the school district to exclude the student until the placement issue is settled through normal due process channels. The burden, however, is clearly on the school district to prove that the student cannot remain in the then current placement.

ADMINISTRATIVE IMPLICATIONS

If a school administrator is required to ask the courts to intervene in a disciplinary matter, it is critical that all efforts to meet the student's needs, all disciplinary infractions, and the school's attempts to resolve the problem have been carefully documented. Since documentation

after the fact is generally incomplete and carries little weight, it is best to view every situation from the outset as one that may wind up in court. This strategy may result in over-documentation; however, in this instance too much is better than too little.

School officials should begin by taking steps to ensure that potentially dangerous handicapped students are identified early and that IEPs are developed that are reasonably calculated to meet their needs. In this respect a high quality evaluation of the student is invaluable. A plan to deal with misconduct should be developed and written into the student's IEP. If misconduct does occur, and the student is disciplined in accordance with the IEP, the school district will be standing on legally safe ground. If the misconduct continues, the IEP team should be reconvened to determine if additional services could be added to the IEP that would help to curb the misconduct.

If it appears that a student may not be able to be maintained in the mainstream environment, the school district must have other options available. If court intervention is necessary, school officials must present the court with some options. The school district cannot expect the court to allow an exclusion while their administrators begin the process of seeking out an alternative placement.

School officials must also be able to show, with documented evidence, that all possible avenues for meeting the student's needs within the mainstream and all normal

disciplinary procedures have been exhausted. Secondly, the school district must be able to show that the misbehavior was such that it created a danger to other students or substantially disrupted the educational environment. Also, administrators must be able to show that they responded swiftly and appropriately to the misconduct. Finally, evidence must be presented to show that the IEP team made good faith efforts to work out an alternative plan with the student's parents.

The courts are predisposed to favor the student's current placement; however, they will rule in favor of the school district if school authorities can show that reasonable efforts were made to solve the disciplinary problem. The courts are not inclined to substitute their judgement for that of school officials in disciplinary matters as long as the school district can present a reasonably good case. In this respect it is important that the school district can show that steps were taken to ensure that the student's rights under the EHA were not violated. Procedural flaws could prove to be fatal to the school district.

DOCUMENTATION STRATEGIES

The forms at the end of this paper can be adapted by school districts to assist with the development of disciplinary policies and procedures. Use of these forms will assist with the documentation process that will prove to be invaluable in the event of court action. Each form is explained below.

Figure 1 outlines the basic procedural steps that should be taken when a handicapped student exhibits misbehavior that seriously threatens the safe and efficient operation of the school. These steps must be taken to ensure that the student's EHA rights are not violated.

Figure 2 contains two statements that may be used on a handicapped student's IEP. The first statement should be included on the IEP of a student who has not exhibited any major disciplinary problems and is not expected to in the immediate future. The second statement should be used for students who have been exhibiting misconduct or whose evaluative data indicates that they may potentially be disruptive.

Figure 3 is a sample disciplinary policy that would supplement the school district's student handbook or usual code of discipline. It should be used in conjunction with the second IEP statement outlined in Figure 2.

Figure 4 is a sample notice to parents that should be used when a suspension is contemplated. This form differs from the usual suspension notice in that it indicates that the school district recognizes the unique status of a handicapped student.

Figure 5 outlines the special rights a handicapped student has in the disciplinary process. It should be used in conjunction with the notice in Figure 4.

Figure 6 is a sample of a form that could be used to document acts of misbehavior. This type of documentation

would help to convince a court that the misbehavior was continuous and that the school district made good faith efforts to deal with it. It is suitable for use with all students.

REFERENCES

1. 20 U.S.C. § 1401 et seq.
2. Osborne, A.G., THE COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES. West Nyack, NY: Parker Publishing Co. (1988).
3. 20 U.S.C. § 1415 and 34 C.F.R. § 300.500 et seq.
4. 443 F.Supp. 1235 (D. Conn. 1978).
5. 480 F.Supp. 225 (N.D. Ind. 1979).
6. 635 F.2d 342 (5th Cir. 1981).
7. 682 F.2d 595 (6th Cir. 1982).
8. 741 F.2d 369 (11th Cir. 1984).
9. 765 F.2d 535 (5th Cir. 1985).
10. 762 F.2d 1210 (4th Cir. 1985).
11. 484 U.S. 305 (1988).
12. Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).
13. Supra, n. 11.
14. For example see Lincoln, E.A., "Disciplining Handicapped Students: Questions Unanswered in Honig v. Doe," 51 Ed.Law Rep. 1 (1989) and Bartlett, L., "Disciplining Handicapped Students: Legal Issues in Light of Honig v. Doe," 55 Except. Child. 357 (1989).
15. For example see Osborne, A.G., "Dangerous Handicapped

Students Cannot be Excluded From the Public Schools," 46 Ed.Law Rep. (1988) and Zirkel, P.A., "Disciplining Handicapped Students: Jack and John Went Up the Hill," 69 Phi Del.Kap. 771 (1988).

16. State law may provide further guidance or restrictions on the suspension limit. For additional information see Zirkel, P.A. and Mueller, S.C., "The Ten-Day Rule: Merely Consecutive or Also Cumulative?" 24(3) NOLPE Notes 1 (1989).

17. Zirkel, P.A., "Special Education Law: Recent Developments," 48 Ed.Law Rep. 317 (1988) and Zirkel, P.A. and Richardson, S.N., "The 'Explosion' in Education Litigation," 53 Ed.Law Rep. 767 (1989).

18. Osborne, A.G., THE COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES, supra, n. 2.

Figure 1

PROCEDURAL STEPS

When a handicapped student misbehaves, the following steps should be taken:

1. Initially, school authorities should take whatever immediate measures are necessary to restore order and maintain discipline, including temporarily removing the student from the school. Normal due process must be followed.

2. If more drastic measures are required, or if the student's misconduct has been persistent, or if the student is approaching a cumulative total of 10 days of suspension in one school year refer the student to the school's special education evaluation team.

3. The evaluation team should determine if the student's misconduct is likely to continue. If the team determines that it is, the team should determine if the student can still be educated in the current placement with additional aids and services, or if an alternate, possibly more restrictive, educational placement is required. In either case the student's IEP must be reviewed and revised. If a change in placement is considered, a complete re-evaluation of the student would be advisable. If a change in placement is determined to be necessary, the team must follow the EHA's change in placement procedures.

4. If the parents object to a proposed change in placement and the student's continued presence in the school is likely to result in a substantial disruption to the educational environment or presents a danger to the student or other students, school officials should seek court intervention. If the likelihood of disruption or danger is minimal, school officials should follow normal procedures for a rejected IEP.

Figure 2

SAMPLE IEP STATEMENTS

The following statement may be included in the IEP of a student whose handicap should not cause behavioral problems:

> The evaluation team has determined that the student's handicapping condition is not one that will cause the student to misbehave or in any way prevent the student from observing the usual rules and regulations of the school. Therefore, the student is expected to conform to the school's disciplinary code as outlined in the student handbook. Any and all infractions will be dealt with in accordance with procedures set out in the student handbook.

The following statement may be included in the IEP of a student whose handicap may cause behavioral problems:

> The evaluation team has determined that the student's handicapping condition may on occasion cause the student to misbehave or in some way disrupt the educational process. Therefore, an individual disciplinary policy has been established for the student that is attached to and becomes a part of this IEP. The student is expected to conform to the individual disciplinary policy, and any and all infractions will be dealt with as outlined in that policy. However, nothing in that policy is intended to prevent school authorities from taking whatever emergency or immediate steps that may be necessary to restore order, maintain discipline, or otherwise prevent a dangerous situation from existing.

From: Osborne, A.G. (1988), COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES. West Nyack NY: Parker Publishing Co., Pg. 170.

Figure 3

SAMPLE INDIVIDUAL DISCIPLINARY POLICY

The evaluation team recognizes that the student's handicap will on occasion cause the student to manifest behavior that does not conform to the usual rules and regulations of the school. However, the team also recognizes that a standard of discipline must be maintained for the protection of all students and to minimize disruption to the educational process. Therefore, this individual disciplinary policy has been developed as part of the student's IEP.

The student has been placed in a special education program, and an IEP has been developed that is designed to reduce the effects of the student's handicap and allow the student to perform according to his or her potential. This program is also designed to help the student learn appropriate behavior through the use of behavior modification techniques.

The student may not engage in any activity that will endanger himself or herself, other students, or staff members. The student also may not engage in any behavior that will damage school property. Also, the student is not permitted to engage in activities that will interfere with the educational process for other students. To these ends, the student may not engage in any behavior that is prohibited by the student handbook. (Enclose copy of handbook.)

The following steps will be taken in the event of an infraction:

1. The teacher will employ usual classroom disciplinary procedures.

2. If step 1 fails to correct the misconduct, the teacher will seek assistance from the school guidanace counselor and/or school principal.

3. If the misconduct continues, the student may be removed from the classroom and temporarily detained in a time out area.

4. If the misconduct continues, the student may be sent home for the remainder of the school day.

5. If the misconduct continues when the student returns to school, the student may be suspended for three to five days. During the suspension period the student will be expected to complete all school assignments as provided by the teacher.

6. If the student is sent home or suspended for a cumulative total of ten school days in any school year, the evaluation team will reconvene within five days to determine if a more restrictive placement may be necessary or to develop some other appropriate alternative plan of action to curb the disruption.

From: Osborne, A.G. (1988), COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES. West Nyack, NY: Parker Publishing Co., Pg. 171.

Figure 4

LETTER TO PARENTS REGARDING SUSPENSION

Date: _____

Parent: _____
Address: _____

Dear _____:

This is to inform you that a disciplinary hearing will be held regarding your child, _____ , on _____ at _____ at the _____ School. A decision will be made following the hearing as to what disciplinary action, if any, will be taken. One option to be considered will be a brief suspension. You are invited to attend the hearing.

The specific reasons for the disciplinary hearing are:

The hearing will be very informal; however, your child will be given full opportunity to respond to the above complaints.

Since your child is receiving special education services, the school evaluation team has been notified of this action. The team chairperson has been invited to attend the hearing.

A suspension is not considered to be a major disciplinary action and requires only minimal due process. If, however, your child receives over ten days of suspensions in a school year, more elaborate due process procedures will be utilized. These procedures will conform to all the EHA's due process safeguards for a handicapped student. Those procedures are outlined in the enclosed notice.

School Principal's Signature

Adapted from: Osborne, A.G. (1988), COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES. West Nyack, NY: Parker Publishing Co., Pg. 173.

Figure 5

NOTICE OF RIGHTS TO A HANDICAPPED STUDENT
FACING MAJOR DISCIPLINARY ACTION

1. The student has the right to have the evaluation team determine whether or not the current special education program is appropriate to meet the student's needs.

2. If the team determines that the current program is not appropriate, the student has the right to be appropriately placed. The right to an appropriate placement includes the right to be placed in the least restrictive environment. Therefore, the student also has the right to a determination of whether additional supplementary aids and services would make the current placement appropriate.

3. Any determinations made by the evaluation team may be appealed to an independent hearing officer. The hearing officer's decision may be appealed to a higher level hearing panel and eventually to the courts.

4. Until all such due process proceedings are completed, the student has the right to remain in the current placement unless the student's presence would constitue a danger to the student or others or would cause a substantial disruption to the educational process. The student may be removed from the current placement while due process proceedings are pending only with parental consent or by court order.

Adapted from: Osborne, A.G. (1988), COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES. West Nyack, NY: Parker Publishing Co., Pg. 174.

Figure 6

RECORD OF DISCIPLINARY ACTION

School Year:

Student:
Grade:

School:

Date	Disciplinary Code Infraction	Action Taken

From: Osborne, A.G. (1988), COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES. West Nyack, NY: Parker Publishing Co., Pg. 175.